

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33876

STATE OF IDAHO,)	2008 Unpublished Opinion No. 391
)	
Plaintiff-Respondent,)	Filed: March 6, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
LARRY ALAN TAYLOR,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Fred M. Gibler, District Judge.

Order denying motion to withdraw guilty plea, affirmed.

Dustin D. Deissner of Van Camp & Deissner Law Firm, Spokane, Washington, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Larry Alan Taylor appeals from the district court's order denying his motion to withdraw his guilty plea. For the reasons set forth below, we affirm.

A grand jury indicted Taylor for trafficking in methamphetamine. I.C. § 37-2732B(a)(3).¹ After a trial, a jury found Taylor guilty. Taylor moved for a new trial. Taylor argued that the state failed to disclose the existence of audio recordings of telephone conversations between Taylor and several witnesses, and the state used the recordings to impeach witnesses at trial. The district court granted Taylor's motion for a new trial. Taylor moved to dismiss the indictment, arguing that the prosecutor failed to disclose that a witness provided false testimony to the grand jury and that the indictment did not adequately allege the charged offense. Taylor then filed a motion, through counsel, clarifying that the motion to

¹ The grand jury also indicted Taylor for one count of delivery of a controlled substance. I.C. § 37-2732(a). The district court dismissed that charge, however, at the state's request.

dismiss incorrectly asserted that the prosecutor failed to disclose the falsity of the witness's testimony. On the date scheduled for the hearing on his motion to dismiss, Taylor filed a pro se motion to dismiss. The pro se motion asserted several bases to dismiss the indictment, including that a witness provided false testimony to the grand jury. At the hearing on Taylor's motion to dismiss, however, Taylor entered an *Alford*² guilty plea to a reduced charge of possession of methamphetamine with intent to deliver. I.C. § 37-2732(a)(1)(A). The district court sentenced Taylor to seven years, with two years determinate. The district court also granted Taylor credit for time served, suspended the sentence, and placed Taylor on probation for two years.

Taylor filed a motion to withdraw his guilty plea approximately three weeks after sentencing. In his motion, Taylor asserted that he was innocent and pled guilty because he desperately wanted to see his family after being in custody for two years. At the hearing on Taylor's motion, Taylor testified that his probation officer had intimidated him and threatened to lengthen the term of his probation from two years to five years by finding him in violation of the terms of his probation. Taylor appeared to assert that the probation officer's conduct after sentencing was an additional ground supporting his motion to withdraw his plea. The district court denied Taylor's motion. Taylor appeals, asserting that the district court abused its discretion in denying his motion to withdraw his guilty plea.

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* Also of importance is whether the motion to withdraw a plea is made before or after sentence is imposed. Idaho Criminal Rule 33(c) provides that a plea may be withdrawn after sentencing only to correct manifest injustice. The stricter standard after sentencing is justified to insure that the accused is not encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence were unexpectedly severe. *Id.* Accordingly, in cases involving a motion to withdraw a plea after sentencing, appellate review is limited to reviewing the record and determining whether the trial court abused its

² See *North Carolina v. Alford*, 400 U.S. 25 (1970).

sound discretion in determining that no manifest injustice would occur if the defendant was prohibited from withdrawing his or her plea. *State v. Lavy*, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992).

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

In the present case, Taylor filed his motion after the district court sentenced him. Our review is thus limited to whether the district court abused its discretion in determining that no manifest injustice would occur if Taylor was prohibited from withdrawing his plea.

Taylor first asserts that the district court abused its discretion by failing to rule on his motion to dismiss or advise him that he would waive that motion by pleading guilty. Taylor did not assert this argument below as a basis to withdraw his guilty plea. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Additionally, the record before us does not include the transcript from the hearing where Taylor pled guilty and we cannot, therefore, determine whether Taylor is correct that the district court failed to inform him that he would waive the motion to dismiss by pleading guilty.³ It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *State v. Murinko*, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991). Because Taylor did not present this argument below or provide a sufficient record for us to review this argument on appeal, we will not further address it.

Taylor also asserts that the district court abused its discretion by denying his motion to withdraw his guilty plea based on his declaration of innocence. A declaration of innocence alone, however, does not entitle a defendant to withdraw a guilty plea. *State v. Knowlton*, 122 Idaho 548, 549, 835 P.2d 1359, 1360 (Ct. App. 1992). A denial of factual guilt is not a just

³ The record contains the minutes from the hearing, but the minutes do not set forth the rights which the district court informed Taylor he would waive by pleading guilty.

reason for the later withdrawal of the plea, in cases where there is some basis in the record of factual guilt. *State v. Dopp*, 124 Idaho 481, 486, 861 P.2d 51, 56 (1993). Here, the record contains evidence that Taylor committed the crime to which he pled guilty—possession of methamphetamine with intent to deliver. Furthermore, although Taylor testified in support of his motion to withdraw his guilty plea, he never testified that he was factually innocent. Thus, the record contains no evidence of Taylor’s innocence. We hold that the district court did not abuse its discretion in rejecting Taylor’s declaration of innocence as a basis to withdraw his guilty plea.

Taylor next asserts that the probation officer’s conduct entitled him to withdraw his guilty plea. At the hearing in the district court, Taylor appeared to argue that he was entitled to withdraw his guilty plea because the probation officer intimidated him and threatened to lengthen the term of his probation from two years to five years by proving a violation of the terms of probation. On appeal, however, Taylor asserts that, because the probation officer threatened to lengthen the term of probation, the district court breached the plea agreement. Even if we assume that Taylor preserved for appeal the argument that the district court breached the plea agreement, the record does not support Taylor’s implicit assertion that the plea agreement bound the district court to impose a two-year period of probation. As noted above, Taylor has not included the transcript from the hearing where the district court accepted Taylor’s guilty plea. The minutes from the hearing include some terms of the plea agreement, but the minutes do not indicate that the district court agreed to impose a period of probation no longer than two years prior to accepting Taylor’s guilty plea. Additionally, the record does not contain a written plea agreement. Taylor has thus failed to meet his burden to substantiate his factual assertions regarding the plea agreement with relevant portions of the record. We also note that the probation officer’s conduct had no bearing on whether the district court breached any promises made in the plea agreement with regard to the length of the period of probation. The district court—not the probation officer—had the ability to set the length of the period of probation. *See* I.C. § 19-2601(7). Once the district court sentenced Taylor to probation, the district court—not the probation officer—could revoke probation only after finding that Taylor violated the terms of the probation. *See State v. Leach*, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001). *See also* I.C. § 20-222. We hold that the district court did not abuse its discretion in rejecting the probation officer’s conduct as a basis for Taylor to withdraw his guilty plea.

In sum, we will not address Taylor's argument that the district court abused its discretion by failing to rule on his motion to dismiss or advise him that he would waive that motion by pleading guilty. We hold that the district court did not abuse its discretion in rejecting Taylor's declaration of innocence and the probation officer's conduct as bases for Taylor to withdraw his guilty plea. We therefore affirm the district court's order denying Taylor's motion to withdraw his guilty plea.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**